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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 TODD and KAREN BRANDT,
9 Plaintiffs,

10 v.

11 AMERICAN BANKERS INSURANCE
12 COMPANY OF FLORIDA,
13 Defendant.

Case No. C08-5760BHS

ORDER GRANTING
PLAINTIFFS' REQUEST TO
CONDUCT DEPOSITIONS AND
RENOTING DEFENDANT'S
MOTION TO SET ASIDE
DEFAULT JUDGMENT

14 This matter comes before the Court on Defendant's motion to vacate default
15 judgment. Dkt. 24.

16 The Court may set aside an entry of default for good cause, Fed. R. Civ. P. 55(c), and
17 it may set aside a default judgment for excusable neglect. Fed. R. Civ. P. 60(b)(1). The
18 movant has the burden of demonstrating that the interest in deciding a case on the merits
19 outweighs the "very important interest in the finality of judgments." *TCI Group Life Ins.*
20 *Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). The decision of whether to set aside a
21 default judgment is discretionary. *Id.* at 695.

22 The parties agree that, in deciding the Defendant's motion, the Court should consider
23 the three factors set out in *Falk v. Allen*, 739 F.2d 461 (9th Cir. 1984): (1) whether Plaintiffs
24 will be prejudiced if the Court sets aside the default judgment, (2) whether Defendant has a
25 meritorious defense, and (3) whether culpable conduct of Defendant led to the default.
26 However, the parties disagree as to whether the Court should consider these factors

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28 ORDER – 1

1 disjunctively or conjunctively. As the parties point out, Ninth Circuit opinions are not
2 entirely consistent on this issue. *Compare TCI*, 244 F.3d at 696 (suggesting that the analysis
3 for consideration of a motion to set aside a default judgment involves a balancing of the *Falk*
4 factors) with *Franchise Holding II, LLC v. Huntington Rest. Group, Inc.*, 375 F.3d 922, 926
5 (stating that the *Falk* factors are disjunctive); *see also Employee Painters*, 480 F.3d 993,
6 1000 (9th Cir. 2007) (stating that the *Falk* factors “inform” a trial court’s decision, and
7 upholding trial court’s denial of motion to set aside default judgment after finding
8 defendants culpable and without a meritorious defense).¹

9 A defendant’s conduct is culpable for the purposes of the *Falk* analysis where there is
10 “no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith
11 failure to respond.” *Employee Painters’ Trust v. Ethan Enter., Inc.*, 480 F.3d at 1000
12 (*quoting TCI*, 244 F.3d at 698).

13 Plaintiffs concede that Defendant has a meritorious defense. Plaintiffs urge the Court
14 to deny Defendant’s motion under the other two *Falk* factors. However, the Court cannot
15 determine whether Defendant acted with culpability because the record is not fully
16 developed.

17 With regard to the culpability factor, Defendant claims that it did not receive a copy
18 of the summons and complaint. In support, Defendant filed a declaration by Patricia Quint, a
19 claims director at American Bankers. Plaintiffs maintain that a letter was sent to David
20 Smith, a claims adjuster for American Insurance, which included a copy of the complaint.
21 Dkt. 24 at 3 (Declaration of Bradley Maxa); *see also id.* at 9 (January 2, 2009 letter from Mr.
22 Maxa to Mr. Smith). Defendant denies having received this letter, *see* Dkt. 32 at 6, but did
23 not file a declaration from Mr. Smith in support of this contention, instead citing Ms. Quint’s

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25 ¹ The Court notes that it appears that the *TCI* standard, whereby a court balances the three
26 factors, appears to be the proper standard. While *Franchise Holding* was decided after *TCI*, it did
27 not overrule *TCI*, and the *Franchise Holding* court went on to evaluate the three *Falk* factors. In
addition, in *Employee Painters*, decided after *Franchise Holding*, the court evaluated more than one
Falk factor.

1 declaration. In addition, Plaintiffs provided evidence that the complaint and summons was
2 received by Alicia White, a representative of the Corporation Service Company, which
3 appears to be the registered agent for Defendant. Dkt. 26 at 2 and 9. Plaintiffs urge the Court
4 to allow them to conduct limited discovery with regard to what happened to the complaint
5 by interviewing Ms. White and Mr. Smith. The Court concludes that this request is
6 reasonable and is therefore granted.

7 Should the Court ultimately decide to set aside the default judgment, Defendant will
8 be ordered to reimburse Plaintiffs for the reasonable costs of conducting this inquiry. The
9 Court would likely condition a setting aside of the default judgment on Defendant
10 reimbursing Plaintiffs for other costs incurred as well. *See Nilsson, Robbins, Dalgarn,*
11 *Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1546-47 (9th Cir. 1988) (a trial
12 court has discretion in setting conditions for setting aside a default judgment); *see also* Fed.
13 R. Civ. P. 60(b) (on “just terms” a court may relieve a party from final judgment).

14 The Court hereby renotes Defendant’s motion to set aside the default judgment for
15 July 10, 2009. Plaintiffs may supplement their response to Defendant’s motion to address
16 issues raised during their inquiry on or before July 6, 2009. Defendant may file a reply on or
17 before the noting date. The page limit for these briefs is 8 pages.

18 DATED this 16th day of June, 2009.

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28 BENJAMIN H. SETTLE
United States District Judge